SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957.

No. 218

MASSEY-HARRIS-FERGUSON LIMITED,
Petitioner,

against

HON. MARION SPEED BOYD, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE,
Respondent.

REPLY BRIEF OF PETITIONER, MASSEY-HARRIS-FERGUSON LIMITED, IN FURTHER SUPPORT OF ITS PETITION FOR CERTIORARI AND MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT.

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The District Court in Tennessee ruled that petitioner Canadian corporation, which does no business in the United States, is subject to its jurisdiction and to the antitrust laws of the United States simply by service in Tennessee on its wholly-owned American subsidiary, which it admittedly controls.

The issue before this Court is whether the decision permitting the antitrust laws to have this extra-territorial effect is to be corrected at this time under the All-Writs statute or whether petitioner must defend itself and face the dilemma of violating either the laws of its home country or of not complying with the federal rules, only at some

later date possibly to have an appellate court rule that it actually was not subject to suit.

Respondent deals with the district court's ruling, which the Court of Appeals said was "doubtful both as a matter of fact and in point of law," only with a passing, one page reference (p. 32) and then proceeds to devote the bulk of its brief to showing that petitioner controls its wholly-owned American subsidiary.

Petitioner concedes, in the words of the District Court, that it exercises the "control and dominion" inherent in its complete stock ownership and, indeed, would be delinquent and guilty of mismanagement if it did not. This control, however, could not possibly lead even to a suggestion that the corporate forms between the Canadian and American companies were not real but were pure fiction, tantamount to fraud, within the dictum of *Cannon Manufacturing Company* v. *Cudahy Packing Co.*, 267 U. S. 333. The lower court made no finding and respondent has made no argument or showing that the corporate forms were not real.

The narrow issue is simply whether service on an American subsidiary can bring a Canadian parent corporation before the court to face charges under the antitrust laws solely because it exercises its lawfully given powers and obligations of "control and dominion" through stock ownership over an American company.

I.

This case has a serious impact on international commercial relations.

Respondent makes light of this case's effect on this country's foreign and domestic commerce and on international commercial relations, referring to it as a "heretofore

unknown ground for certiorari". Certainly this Court has always considered the practical importance of questions presented to it in determining whether certiorari should issue. And if a decision has an important and adverse effect on international commercial relations, its practical importance necessarily is great.

Further evidence of the importance of considering the petition and of reversing the District Court decision in the instant case because of the impact of the "Business Records Protection Act" of The Province of Ontario, Canada is to be found in a recent report by an eminent committee of the Association of the Bar of the City of New York. The Special Committee on Antitrust Laws and Foreign Trade issued on May 29, 1957 a preliminary report entitled "National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations". In the course of this report the Committee expressed great concern over the impact of our antitrust laws and their enforcement on our relations with other nations.

The Report states:

> "There are many instances of resentment expressed by foreign governments over our efforts to enforce our antitrust laws extraterritorially, a resentment that has more than once been expressed in legislation designed to impede if not frustrate our efforts. That resentment is not hard to understand; it has many roots." (p. 7)
>
> "When we violate the law of nations by asserting jurisdiction to enforce our antitrust laws against citizens of other nations we create substantial skepticism as to our good faith in insisting that those nations adhere to fundamentals of international law in other respects. We also cause speculation as to whether we would be willing to have our citizens

subjected to corresponding laws of other nations. As a British court stated:

> "I conceive that the American Courts would . . . be slow (to say the least) to recognize an assertion on the part of the British Courts of jurisdiction extending (in effect) to the business affairs of persons and corporations in the United States." *British Nylon Spinners* v. *I. C. I.*, [1953] 1 Ch. 19.

. . . . . .

"A striking example of resentment at our efforts to push antitrust extraterritorially is found in the efforts of the Department of Justice to investigate the Canadian newsprint industry in 1947. Grand jury subpoenas were served upon Canadian newsprint companies. This prompted the Canadian Embassy in Washington to seek the aid of the Department of State to prevent 'any undesirable interference' with these companies. The Secretary of State sought the views of the Attorney General and was advised that this proceeding was not 'in any manner inconsistent with our foreign policy.' The Canadian companies persisted in their refusal to honor the American grand-jury subpoenas and, when contempt proceedings were contemplated, the Secretary of State reported to the Attorney General that 'The investigation has aroused very considerable resentment and hostility in Canada, which is greatly to be regretted.'

. . . . . .

"The Province of Ontario responded by passing the Business Records Act which bars production of certain business records for use in foreign courts. It is cited as legislation passed to protect members of the Canadian newsprint industry in that Province against antitrust investigation by American process.

. . . . . .

"A similar law has been passed in the Netherlands, a country which in 1952 formally protested to our Department of State against efforts of our government to compel Dutch subsidiaries of American parents to send documents out of the country in response to the demand of process of an American court. Removal of documents was forbidden. So, too, was removal of documents of British corporations forbidden by order of the British Government in connection with the same investigation and at about the same time.

"The Swiss Government reacted sharply to the recent proceedings against American and Swiss watch manufacturers. Formal protests were lodged through diplomatic channels both here and in Switzerland (pp. 12, 13, 14).

"The conclusion we draw from the foregoing review is that antitrust has often affected foreign relations or national security in important instances" (p. 18).

The conclusions of this study provide new evidence of the significant impact of the erroneous decision of the District Court in this case in assuming jurisdiction and the widespread concern in the judiciary and bar, in the business world and by foreign governments caused by arbitrary action of this kind.

The importance of a grant of certiorari or an extraordinary writ to correct this clearly erroneous assumption of jurisdiction could not be more incontrovertible.*

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* Respondent's contention that this Court cannot consider the Canadian statute because it presents a "question of fact" is obviously without merit. This Court is not to be blindfolded or asked to ignore the impact of statutes of Canada, written in clear English language.

The Canadian law was not relevant before the District Court on the question of whether petitioner was found in Tennessee and there was no reason to plead or prove it in connection with that motion. On the petition for mandamus, however, it was important

II.

Respondent's attempt to distinguish the case of *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, is unsound.

Respondent Misinterprets the Language of the *Cudahy* Opinion.

Respondent recognizes (pp. 31-32) the authority of the *Cudahy* case and attempts to distinguish it by a clearly fallacious interpretation of a sentence plucked from the opinion in that case. In that case, Justice Brandeis distinguished cases dealing only with substantive rights arising out of the parent-subsidiary relationship, holding that they had no application in resolving the entirely different question of the effectiveness of service with respect to a parent corporation. The respondent tries to construe his statement distinguishing these cases as creating a special rule of service for situations where the plaintiff is attempting to obtain jurisdiction over the parent by service on a subsidiary, especally where there is an allegation of a conspiracy between the parent and its subsidiary.

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to show the Court of Appeals the way in which the decision below infringed upon the law of Canada and the manner in which the petitioner was placed in jeopardy under those laws. These were considerations which should not have been ignored by the Court of Appeals in determining whether the extraordinary writ should issue.

The cases cited by the respondent for the proposition that foreign law must be pleaded and proved are cases where a claim or defense was based directly on foreign law. Where foreign law is merely used collaterally as a consideration bearing upon the argument or decision of some question of policy, it is no more necessary to prove it formally than it is to prove treatises or other similar materials. The law of Ontario and the policy of the Government of Ontario are therefore matters properly to be considered by the Court in this case.

That respondent's construction is plainly wrong is clear from an examination of the four cases which Justice Brandeis cites immediately following the sentence quoted and relied on by the respondent at page 32 of his brief.

Those cases cited by Mr. Justice Brandeis were concerned only with the parent-subsidiary relationship as it affected some substantive right, and none of them involved any question of service or jurisdiction with respect to the parent corporation or any other party.*

Respondent's Attempt to Avoid the Ruling of the *Cudahy* Case Is Not Supported by the Cases it Cites.

Respondent has buried a group of sixteen cases in a footnote on page 32 of its brief which it characterizes as an "unbroken line of decisions" supporting the principle that a special rule of service applies where there is an allegation in the complaint of conspiracy between the parent and its subsidiary.

This heretofore unheard of theory of jurisdiction was not the basis of the ruling of the District Court and, in fact, in cases brought under the antitrust laws the *Cudahy* case has been held to bar service on the parent without any

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* Thus, in *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, it was held that a judgment in favor of a parent corporation was *res judicata* in an identical action against its subsidiary. In *Chicago M. & St. Paul Railway* v. *Minneapolis Civic & Commerce Corp.*, 247 U. S. 490, it was held that a subsidiary corporation was the instrumentality of its two parents so that an order of the State Railroad Commission denying the subsidiary the right to make an extra charge for its services was valid. In *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71, this Court held a transfer of certain inter-corporate debts from subsidiary corporations to their common parent did not constitute payment of dividends to the parent for tax purposes. Finally, in *United States* v. *Lehigh Valley RR.*, 254 U. S. 255, this Court held only that a subsidiary corporation was so controlled by its parent that a contract between them was not a contract between separate parties and was obnoxious to the antitrust laws.

consideration of the question whether the plaintiff had charged a conspiracy between parent and subsidiary. *E.g.*, *Terry Carpenter, Ltd.* v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Lawlor* v. *National Screen Service Corp.*, 10 F. R. D. 123 (E. D. Pa. 1950).

None of the sixteen cases cited by respondent support the principle for which they are cited. Nearly all of them are not even remotely relevant to the question of effectiveness of service on a subsidiary to obtain jurisdiction over a parent which is involved in this case.

Three of the cases cited are the very decisions distinguished by Justice Brandeis in the *Cudahy* case. Most of the balance of the sixteen cases are like those distinguished by Justice Brandeis in that they deal with some question of substantive law which depends on the parent-subsidiary relationship. In this category are the four cases of *Detroit Motor Appliance Company* v. *General Motors Corp.*, 5 F. Supp. 27 (E. D. Ill. 1933); *Trustees System Co. of Pa.* v. *Payne*, 65 F. 2d 103 (3rd Cir. 1933); *Central Vermont Ry.* v. *Southern New England RR.*, 1 F. Supp. 1004 (D. Mass. 1932); and *Continental Oil Co.* v. *Jones*, 26 F. Supp. 694 (W. D. Okla. 1939).

Two of the cases, *United States* v. *Kissel*, 218 U. S. 601 (1910) and *United States* v. *General Motors Corporation*, 121 F. 2d 376 (7th Cir. 1941), are so completely irrelevant to any issue in this case that their being cited must be a mistake. In the *Kissel* case, the only question decided was that a conspiracy in violation of the antitrust laws may be continuous so that the statute of limitations does not run from the moment when the conspiracy was formed. The *General Motors* case held that where several affiliated corporations were charged with a conspiracy in violation of the antitrust laws they could not be considered a "single trader."

Although two of the remaining cases, *United Chromium Inc.* v. *General Motors Corp.*, 11 F. Supp. 694 (D. Conn. 1935) and *Ross-Bart Port Theater, Inc.* v. *Eagle Lion Films, Inc.*, 140 F. Supp. 401 (E. D. Va. 1954), considered the effectiveness of service of process, they have no present relevance.

In the *United Chromium* case, an infringement action, the parent, a patent holding corporation, admitted in its answer that its subsidiary's factory within the jurisdiction was a regular and established place of business for it. On the basis of this admission the Court held that the parent was a proper party and that proofs of infringement by the subsidiary might be taken as proofs of infringement against the parent. In the *Ross-Bart* case, the plaintiff brought an antitrust action in Virginia in 1953 alleging that the defendant, a foreign corporation, had engaged in a conspiracy in Virginia in 1948. Service was made on the defendant in the District of Columbia and in New York and the defendant conceded that it was found in those jurisdictions. It argued, however, that the service was improper because it did not transact business and was not a resident of Virginia when the action was commenced in 1953. The Court held that the defendant's admitted activities in Virginia in 1948 made the venue proper and justified out-of-state service under Section 12 of the Clayton Act. Thus the problem was one of venue and the question of whether the defendant was "found" in the jurisdiction for purposes of service was not involved.

Elimination of these twelve* clearly irrelevant cases leaves four district court cases in the "unbroken line of authority" cited in behalf of the respondent in the attempt

* The eleven which are discussed, plus *United States* v. *Scophony Corp.*, 333 U. S. 795 which is discussed and shown not to be applicable in the Petition at pp. 16 ff.

to avoid or distinguish the *Cudahy* case. The four remaining cases are a hopeless reserve.

In *Bator* v. *Boosey & Hawkes, Ltd.*, 80 F. Supp. 294 (S. D. N. Y. 1948), the defendant corporation had a managing director residing and working within the jurisdiction where the action was brought and carried on negotiations with respect to the contracts under which the suit arose. The defendant was not held to be subject to service merely because it had a subsidiary which was doing business within the jurisdiction.

Industrial Research Corporation v. *General Motors Corp.*, 29 F. 2d 623 (N. D. Ohio 1928) is the only case which lends any support to the respondent's interpretation of the *Cudahy* opinion. The decision in that case was recently criticized in *Bergholt* v. *Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954), in which the District Judge stated in his opinion that "the unsoundness of the interpretation of the *Cudahy* case offered by the *General Motors* case, *supra* . . . is obvious from an examination of the Cudahy opinion" (p. 719). He went on to point out that the *Cudahy* case established the proposition that cases concerning substantive rights are not applicable to matters of procedure and that the language of the case showed that such cases are not in point in a controversy involving the effectiveness of service of process.

The final two cases in the "unbroken line" are *Pergament* v. *Frazer*, 93 F. Supp. 9 (E. D. Mich. 1949) and *Alexander Young Distilling Co.* v. *National Distillers Products Corp.*, 33 F. Supp. 334 (E. D. Pa. 1940). Both involved adequacy of service under the due process clause and are therefore not applicable in determining whether service meets the stricter requirements of Section 12 of the Clayton Act. Both of these cases also rely heavily on the *General*

Motors case discussed above, but without discussing its interpretation of *Cudahy*. Moreover, both cases are distinguishable from the instant case because in each the parent corporation was transacting business in the forum.

The *Pergament* and *Alexander Young* cases are thus based on an erroneous interpretation of the *Cudahy* opinion and in any event are not controlling in the instant case because of different factual situations.

The Authority of the *Cudahy* Case Is Unimpaired.

The only additional legal argument presented in behalf of respondent to support the District Court's decision is based upon the three cases cited on page 33 of its brief. These cases allegedly show that *International Shoe Company* v. *Washington*, 326 U. S. 310, has left little of the authority of the *Cudahy* case remaining. The respondent in citing these three cases completely ignores the many District Court and Court of Appeals cases cited on pages 15 and 16 of the petition for certiorari, all of which demonstrates that the authority of the *Cudahy* case has been left unimpaired by the *International Shoe* case and other recent Supreme Court decisions.

The three lower courts cited by respondent all involve situations in which the corporation sought to be made a party to the action was itself acting in the jurisdiction in its own behalf or through its own agents. Thus, in *Scholnik* v. *National Airlines Inc.*, 219 F. 2d 115 (6th Cir. 1955), the defendant's planes and crews were flying in the jurisdiction under an interchange agreement with another airline and the second airline was admittedly acting as defendant's agent to solicit business, sell tickets and advertise for the defendant within the jurisdiction. In *Consolidated Cos-*

metics v. *D-A Publishing Company, Inc.*, 186 F. 2d 906 (7th Cir. 1951), the magazines published by the defendant corporation were printed, addressed and deposited in the mail in the jurisdiction where the action was pending by a corporation under contract with the defendant. The defendant had designated a place within the jurisdiction as the office of publication for the purpose of postal regulations. Defendant forwarded all the material which was to be published in the magazine and the corporation which did the printing held in its possession various materials which remained the property of defendant. Under these circumstances the Court held that service on the defendant satisfied the requirements of due process.

Finally, in *Clover Leaf Freight Lines, Inc.* v. *Pacific Coast Wholesalers Association*, 166 F. 2d 626 (7th Cir. 1948), the defendant, a California corporation, was held to be doing business in Illinois because an Illinois corporation acted as its agent in receiving shipments consigned to the defendant and assembling them into carload lots for shipment to California. The Illinois corporation transacted a large and important part of the business of the defendant and the defendant's name appeared on a sign over the receiving facilities of the Illinois corporation. It was held that the requirements of due process were satisfied.

In none of these three cases was a corporation held amenable to service because of the activities of a subsidiary; in all of them the defendant sought to be served was acting directly within the jurisdiction through its authorized agents. Moreover, in each of these cases, the question was whether the requirements for due process had been satisfied; the stricter requirements of Section 12 of the Clayton Act were not involved. See Pet. for Cert., pp. 14-15.

The respondent's brief makes no effort to support either the reasoning of the District Court or its distinction of the *Cudahy* case on the ground that that case was a contract action and not an antitrust case.

Petitioner submits that the authority of the *Cudahy* case is unimpaired, that a parent corporation cannot be brought before a court merely by serving its subsidiary

III.

Respondent's discussion of the evidence before the District Judge does not support the ruling below.

Recognizing the weakness of its legal position on the jurisdictional question, the respondent has attempted to confuse and bury the issue by an extensive detailing of the material dealing with the ordinary and required control by the Canadian Company of its American subsidiary which was presented to the District Judge on the motion to quash service. Such a consideration of the evidence is unnecessary and inappropriate, and the presentation of the facts relating to this admitted control tends to obscure the narrow issue decided in the District Court.

The record should first be set clear by what the District Court actually found as fact—this was merely that the "American company operates wholly under the control and dominion of the Canadian company" (App. 11b).

The District Court did not find that the petitioner was acting directly in the United States apart from the activities of its wholly-owned subsidiary. The entire decision of the District Court was based upon this question of the control exercised by the Canadian parent over its American subsidiary.

Nearly all of the facts discussed in the respondent's brief were facts not even discussed by the District Court and not relevant on the theory upon which the District Court proceeded. Others of the facts discussed are merely details of evidence relating to control which were embodied in the opinion of the District Court and conceded to be true by the petitioner. None of this evidence is sufficient to support service on the petitioner.

Petitioner's Activities With Respect to the Business of Harry Ferguson, Inc.

Much of the evidence discussed by the respondent, including all of that presented at pages 13 to 18 of its brief, related to the alleged supervision and control by petitioner of the business of its wholly-owned subsidiary, Harry Ferguson, Inc., between August, 1953, and the merger of that corporation with petitioner's other wholly-owned American subsidiary, Massey-Harris Inc. in September, 1954, to form defendant Massey-Harris-Ferguson, Inc. Respondent's rather lengthy discussion is completely unrelated to the grounds on which the District Court based its decision and to the issues presented to this Court. Also, throughout the principal discussion respondent neglects to point out (until later in its brief (pp. 23-24)) that the same persons referred to were also officers not only of the Canadian company but also of Massey-Harris, Inc., leading to a finding of common officers between the two companies.

The remainder of the evidence described by the respondent adds nothing to the findings of fact which were made by the District Court. The court found that there were interlocking officers and directors as between the Canadian and the American companies, that the annual statements of the Canadian company referred to the American company as a division, that engineers on one occasion were sent to

Mississippi (not Tennessee as claimed) from Canada to run experimental field tests on farm machinery which was under development and that these employees were advanced expense money by the American company and that merchandise manufactured by the Canadian company of the value of $3,000,000 yearly was sold in the Tennessee-Mississippi-Arkansas area by the American company. The petitioner conceded the truth of these facts in its Petition, yet the respondent devotes many pages to a detailed summary of the evidence upon which those findings were based.

The respondent also details a number of instances in which persons whom it identifies as officers of the petitioner participated in discussions and other activities pertaining to business of the American company in the western district of Tennessee. It is not until later in its brief that the respondent in passing recognizes that all of these persons were officers of the American company when they performed these activities and were fulfilling their duties as corporate officers of the American Company.

Under the Rule of the *Cudahy* Case the Petitioner Was Not Doing Business in the Western District of Tennessee.

The District Court did not find and the facts discussed in respondent's brief do not show that the existence of the American company was a mere fiction tantamount to fraud nor that there was any greater control exercised by the petitioner over its subsidiary than was exercised by the parent corporation in the *Cudahy* case. As Justice Brandeis pointed out in that opinion, identity of interest between parent and subsidiary and control over the subsidiary by the parent has no legal significance (267 U. S. at 336-37).

That the corporate distinction or "form" between the two affiliated companies was assiduously maintained could not be better demonstrated than by the assertions of

respondent. The facts that the same persons held titles in both companies, that financial statements after independent audit were consolidated, and that the many more other distinctions relating to taxes, daily operations, etc., were maintained belie any charge that the corporate forms were a fiction.

Moreover, nearly all of the facts relied on by the respondent have been specifically rejected as irrelevant in one or more of the applicable cases in attempts to hold a parent corporation by service on a subsidiary.

As to consolidated financial statements, see:

Peterson v. *Chicago, Rock Island & Pacific Railway Co.*, 205 U. S. 364;

Harris v. *Deere & Company*, 223 F. 2nd 161 (4th Cir. 1955).

As to interlocking directorates and participation by the parent in policy decisions of the subsidiary, see, in addition to the *Cudahy* case:

Terry Carpenter, Ltd. v. *Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954);

Nagl v. *Northam Warren Corp.*, 8 F. R. D. 130 (D. Neb. 1948).

As to the advancing of money or paying of salaries by the subsidiary for its parent, see:

Echeverry v. *Kellogg Switchboard & Supply Company*, 175 F. 2nd 900 (2d Cir. 1949).

As to the use of stationery by the subsidiary bearing the name of the parent, see:

Fergus Motors v. *Standard-Triumph Motor Company*, 130 F. Supp. 780 (S. D. N. Y. 1955);

Pfeiffer v. *United Booking Office*, 93 F. Supp. 363 (N. D. Ill. 1950).

As to the coordination of activities such as engineering, see:

Commonwealth Amusement Enterprises, Inc. v. *Colonial Theatres Co.*, 79 F. Supp. 763 (D. Mass. 1937).

Finally, petitioner points out that it has never sold any farm machinery or in any other way transacted business in the United States.

Any of the farm equipment manufactured by petitioner which was sold anywhere in the United States was purchased by the American Company, title passed to that company in Canada, and at all times the American subsidiary had title, control and direction over the equipment until it sold the equipment to, among others, distributors such as plaintiffs.

Even if the facts were otherwise, the irrelevancy of the charge that the petitioner shipped goods to Memphis is made clear by the *Cudahy* case itself. In that case the parent shipped goods directly to dealers in the jurisdiction of the subsidiary where service was made (267 U. S. at 335). This Court rejected this as irrelevant.

Respondent's effort to introduce extraneous factual issues into this case cannot obscure the fact that the essential question is whether the parent corporation can be served under Section 12 of the Clayton Act because of the activities within the jurisdiction of a wholly-owned subsidiary which is nonetheless a separate corporate and economic entity. It is this legal issue which was presented to the Court of Appeals and which is now presented to this Court.

IV.

Respondent's contentions with respect to the appropriateness of certiorari or the extraordinary writ are without merit.

Considerations Justifying the Grant of the Writ of Certiorari Are Present in This Case.

Respondent argues that certiorari is inappropriate since there is no conflict between the decision of the Court of Appeals for the Sixth Circuit refusing to issue a writ of mandamus in the present case and ruling of any other Court of Appeals. Petitioner has not urged that there is a specific conflict with any other single case for the simple reason that issuance of the extraordinary writ depends upon many considerations which are never the same in any two cases. As the Petition points out, however, there are present in the instant case all of the considerations which have been thought to justify issuance of the extraordinary writ. Denial of the writ under those circumstances is certainly not in accord with the decisions of this Court. Respondent has cited no case in which mandamus has been denied in a situation comparable to that presented here.

Many of the cases cited by respondent at page 2 of its brief did not raise a question with respect to the jurisdiction of the District Court. *E.g., Roche* v. *Evaporated Milk Association,* 319 U. S. 21; *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379; *In re Previn,* 204 F. 2d 417 (1 Cir. 1953); and *Radio Corporation of America* v. *Igoe,* 217 F. 2d 218 (7th Cir. 1954). Some of the cases cited exhibit a reluctance to issue the extraordinary writ which is entirely inconsistent with the views expressed by this Court in *La Buy* v. *Howes Leather Co.,* 352 U. S. 249. *E.g., Hydraulic Press Mfg. Co.* v. *Moore,* 185 F. 2d 800 (8th Cir. 1950); *Sun-*

beam Corp. v. *Picard*, 227 F. 2d 596 (6th Cir. 1955). *In re Josephson*, 218 F. 2d 174 (1 Cir. 1954), was a case cited in the minority opinion in the *La Buy* case (352 U. S. at 263), but which apparently did not commend itself to the majority.

Certainly in none of the cases cited by the respondent were there considerations requiring issuance of the extraordinary writ comparable to the compelling reasons presented here.

Moreover, the decision of the Court of Appeals in the instant case permits to stand a District Court decision which is in conflict with the decisions of this Court as well as decisions of a number of lower Federal courts and which constitutes usurpation of jurisdiction.

Moreover, the Court of Appeals has itself, in the language of the rules of this Court, departed from the "accepted and usual course of judicial proceedings" by denying a writ of mandamus solely because of the difficulty of the question of law presented.

Two of the cases cited in a footnote in respondent's brief (p. 7) in support of the proposition that "every reported case denies" an extraordinary writ where a difficult or doubtful legal problem is presented, have already been discussed and distinguished as being clearly inapplicable to the present issues (Pet., pp. 28-29). The third case, *In the Matter of Hussein Lutfi Bey*, 256 U. S. 616, held that in a situation where novel and difficult questions of law were involved, this Court had discretion to issue the extraordinary writ but would deny the writ where a question of jurisdiction over a ship allegedly belonging to a foreign sovereign was involved and the State Department had, on application by the defendant, declined to present a suggestion that the ship belonged to that sovereign.

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The Record Submitted Is Adequate.

Respondent challenges the sufficiency of the record certified to this Court by the Court of Appeals. This challenge is without any basis and should be considered for what it is—a device to obscure issues.

The record which was certified was in complete compliance with Rule 21(3) of this Court, which provides that the filing of copies of the appendices filed below, together with the proceedings in that Court, is an acceptable substitute for filing the entire record. This was done. Rule 21(3) was strictly complied with and there is no ground for objection by the respondent.

Respondent also suggests that the appendix filed in the Court of Appeals did not meet the requirements of that Court. There is no merit whatsoever to that suggestion since Rule 16(c) of the Court of Appeals for the Sixth Circuit requires only that relevant portions of the pleadings, the judgment below, and "such other parts of the record material to the questions presented as the appellant or petitioner deems it essential for the judges of the court to read in order to decide those questions" need be printed in the appendix.

Petitioner's Application for Mandamus to the Court of Appeals Does Not Preclude Its Applying for the Same Relief to This Court:

Respondent argues (pp. 8-9) that the petitioner's Motion for Leave to File a Writ of Mandamus should be denied because similar relief is available in the Court of Appeals. The existence of jurisdiction to issue such writs in the inferior courts does not, however, preclude application to this Court when the petitioner has exhausted its remedies below. Here the petitioner sought mandamus in the Court of Appeals and its petition was denied. The application to this Court for the extraordinary writ is

now entirely appropriate. This Court issued the extraordinary writ in exactly this situation in *Ex parte Kumezo Kawato*, 317 U. S. 69. *Ex. Parte Republic of Peru*, 318 U. S. 578, this Court entertained a petition for mandamus even though the petitioner had not exhausted his remedy in the Court of Appeals.

The Expense and Inconvenience to Petitioner Occasioned by the District Court's Ruling Justifies Issuance of the Extraordinary Writ.

Respondent asserts that the expense and inconvenience to the petitioner occasioned by the lower court's ruling are irrelevant. As has been pointed out in the Petition (p. 24) and in the decisions of this Court cited therein, such considerations of expense and inconvenience are relevant and important when taken together with other considerations justifying the use of the extraordinary writs.

The respondent lists the various discovery proceedings which have been invoked in behalf of the American Company, with the obvious implication that there was some impropriety in the conduct of these proceedings. On several occasions, however, in ruling on motions made by the plaintiffs, the District Court has stated that the proceedings conducted on behalf of that defendant were in all respects proper.

The petitioner will not take the time and space here to correct the respondent's colored and inaccurate description of the course of these proceedings.

There is no sense in the respondent's argument that because one defendant has already been subject to substantial expense and inconvenience by the necessity of preparing its defense in this case there is no harm in subjecting another party beyond the Court's jurisdiction to additional expense and inconvenience.

The *La Buy* Case Supports Issuance of the Extraordinary Writ.

The respondent attempts to confine the opinion in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, to a ruling on the propriety of the District Court's use of a Master. The opinion went far beyond this in defining the proper use of the extraordinary writs. Thus the dissenting justices expressed a "particularly grave concern" at what they felt was a departure from settled principles governing the use of the extraordinary writs. As petitioner has pointed out, both majority and minority agreed that mandamus is appropriate when the District Court has exceeded its jurisdiction (Pet., pp. 20-21).

Conclusion.

Petitioner respectfully prays that an appropriate case has been presented for this Court to grant the requested relief and prays that this Court review and reverse the decisions below.

Respectfully submitted,

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